Supreme Court, U.S.
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No. 87-1329

In the Supreme Court of the United States

October Term, 1987

STEPHEN L. BROWNING,

Petitioner,

v.

CHEVRON U.S.A. INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

May petitioner, Stephen L. Browning, claim error in the proceedings below based upon legal issues and theories that were not clearly presented to the trial court prior to its issuance of summary judgment, and if he may, do those theories require a reversal of the judgment below.

LIST OF PARTIES

The parties to the proceedings below include petitioner, Stephen L. Browning, and the following respondents:

Chevron U.S.A. Inc., a Pennsylvania corporation, formerly known as Gulf Oil Corporation.

Consolidation Coal Company, a Delaware corporation.

The Pittsburgh & Midway Coal Mining Co., a Missouri corporation.

Gulf Mineral Resources Corporation was named as a defendant in the complaint filed in this action, but was never incorporated and existed merely as a former division of Gulf Oil Corporation.

Consolidation Coal Company, a Pennsylvania corporation, was named as a defendant in the complaint filed in this action, but was dissolved prior to the instigation of this lawsuit.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondents attach hereto as Appendix "A", a list of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each.

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Respondents, Chevron U.S.A. Inc., Consolidation Coal Company and The Pittsburg & Midway Coal Mining Co., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

This case is a quiet title action brought by petitioner, Mr. Stephen L. Browning ("Mr. Browning"), in the United States District Court for the District of Utah,

to establish his claim to certain lands referred to in this case as the Coal Rights and Fee Lands, the record title to which was once held by his grandfather, Ira Browning. Chevron U.S.A. Inc. ("Chevron") and Consolidation Coal Company ("Consol") are the successors in title and interest to The Kemmerer Coal Company ("Kemmerer"), for whom Ira Browning worked either as an agent or an employee when the events involved in this case occurred. Chevron is the successor to the Gulf Oil Corporation ("Gulf"), a defendant below, and has succeeded to Kemmerer's interest in the Coal Rights and the Fee Lands. Consol is the lessee of record of both the Coal Rights and the Fee Lands under a lease with Chevron.

Upon the parties' cross motions for summary judgment, the district court granted respondents' motions for summary judgment and denied Mr. Browning's motion for summary judgment in a Memorandum Opinion and Order dated November 27, 1985. Petition, App. at 1A. The district court quieted title to the Coal Rights and Fee Lands in Chevron in a judgment entered June 9, 1986, corrected June 25, 1986, in which the court also denied Mr. Browning's April 11, 1986, Motion for Relief From Judgment. *Id.* at 42A. Mr. Browning was represented by counsel at all stages of the proceedings before the district court, but proceeded *pro se* in his appeal to the United States Court of Appeals for the Tenth Circuit. On appeal, the Tenth Circuit affirmed the district court in an order entered August 28, 1987 and denied Mr. Browning's petition for rehearing in an order entered on October 27, 1987. *Id.* at 49A and 53A.

The facts of this case are fully set forth in the district court's memorandum opinion and order. Rather than restating those facts here, respondents adopt the district court's statement of the facts and incorporate that statement herein by reference.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied, because this case presents none of the "special or important reasons" that would justify a full review by this Court. *See* Sup. Ct. R. 17.1. This case arises under diversity jurisdiction and is based solely on Utah law. It presents no important questions of federal or state law; no issues that will affect parties other than the litigants; no conflict with decisions of other courts; and no other reason for the Court to invoke its power of supervision. Moreover, there is no error in the decisions below for this Court to correct. Those decisions are fully supported by the facts and applicable law.

A comparison of Mr. Browning's petition with the complaint filed in this action and the district court's memorandum opinion reveals that Mr. Browning is now departing from the theories presented to the district court. *See* R. Doc. No. 2, Amended Comp., filed Aug. 23, 1983; and Petition, App. at 1A.

In the district court, Mr. Browning claimed that although Chevron holds record title to the Coal Rights, its title to those lands is subject to an express or constructive trust for his benefit as the intestate successor of his grandfather. Mr. Browning now apparently agrees

with the district court that he failed to meet his burden of proving the existence of such a trust.

Similarly, in the district court Mr. Browning disputed Chevron's and Consol's claim that the Fee Lands are impressed with a purchase money resulting trust for their benefit, because Ira Browning acquired the Fee Lands for the benefit of, and with money provided by, Kemmerer. Mr. Browning also argued that if such a resulting trust existed, it had been repudiated and that laches now bars its enforcement. Mr. Browning apparently now agrees with the district court that the evidence does support the conclusion that the Fee Lands were impressed with such a trust and that there is no evidence to suggest that a repudiation of that trust occurred. Similarly, he apparently does not dispute the district court's conclusion that in the absence of a repudiation, laches does not bar the enforcement of a purchase money resulting trust.

It now appears that Mr. Browning rests his claim to both the Coal Rights and the Fee Lands on the theory that his grandfather held title to both of those properties as a purchase money resulting trustee for the benefit of Kemmerer. Mr. Browning then argues that when Ira Browning died the legal title to both the Coal Rights and the Fee Lands descended to his wife and son, May and Lee Browning, who by operation of law took title not as resulting trustees, but rather as constructive trustees. Although as he now appears to admit no repudiation of that trust occurred, Mr. Browning argues that Chevron and Consol are barred from enforcing the constructive

trust because, unlike beneficiaries under express or resulting trusts, the beneficiary of a constructive trust may be barred by laches even in the absence of a repudiation. Mr. Browning's new-found theory comes too late, and neither the facts nor the law supports the theory.

In the district court, Mr. Browning's attorneys filed eight substantive memoranda comprising over 130 pages of argument in support of, and opposition to, the parties' motions for summary judgment. *See* R. Doc. Nos. 59, 66(b), 67(b), 71, 77, 78, 84 and 94. Except for several brief references that might be construed as suggesting portions of Mr. Browning's new theory, Mr. Browning's arguments in the district court were devoted to the arguments outlined in that court's memorandum opinion. *See* R. Doc. No. 66(b), Pl's First Suppl. Resp., filed Oct. 17, 1984, at 31-32; R. Doc. No. 94, Pl's Resp. and Oppo., filed Oct. 15, 1985, at p. 8; and R. Doc. No. 13, Tr. of Hearing, dated December 14, 1984, at pp. 5-6. Mr. Browning's new theory, which contradicts the theories presented in the district court, was explained for the first time in his April 11, 1986, Motion for Relief from Judgment. Not surprisingly, the court's memorandum opinion does not address those theories.

Mr. Browning's new arguments come too late. As appellate courts have observed on numerous occasions, "[w]e are disinclined to consider those matters which were not presented to the trial court for its consideration and are raised for the first time either after trial or on appeal to this court." *Baker v. Penn Mutual Life Insurance Co.*, 788 F.2d 650, 663 (10th Cir. 1986) (cita-

tions omitted). Mr. Browning should not be allowed to base any claim of error on issues that were not pressed in the summary judgment proceedings and were raised and explained for the first time in a motion for relief from judgment. *See, e.g., American Meat Institute v. Pridgeon,* 724 F.2d 45, 47 (6th Cir. 1984) (issues raised for the first time in a motion for reconsideration are untimely, waived and serve no basis to assign error on appeal); and *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama,* 676 F.2d 162, 163 (5th Cir. 1982) (theory not clearly presented to trial court may not be relied upon on appeal).

In any event, the facts will not support Mr. Browning's new theories. His claim that the Coal Rights were subject to a purchase money resulting trust for the benefit of Kemmerer is based on an assertion that Kemmerer provided the purchase price for those lands, an assertion that Mr. Browning denied below. Mr. Browning now believes that the minutes of an April 30, 1908, meeting of Kemmerer's Board of Trustees, which discuss Ira Browning's purchase of certain lands for the benefit of Kemmerer, support his new assertion. R. Doc. 47, Affidavit of O. F. Lorenzi, filed July 31, 1984, attachment. However, Mr. Browning fails to note that the description of the land referred to in those minutes does not match the description of the Coal Rights. Accordingly, the discussion contained in the minutes cannot be viewed as referring to the Coal Rights or establishing that Kemmerer provided the purchase price for those lands. None of the parties was able to establish who paid the purchase price for the acquisition of the Coal Rights. Peti-

tion, App. at 25A-26A. Without such evidence, there is no basis for the imposition of a purchase money resulting trust.

In addition, Mr. Browning's argument that May and Lee Browning succeeded to an interest in the Coal Rights upon the death of Ira Browning is without merit. Prior to his death, Ira Browning conveyed all of his interest in the Coal Rights to P. J. Quealy, Kemmerer's predecessor. *Id.* at 5A. Although the three quitclaim deeds evidencing that conveyance were not recorded until 1949, they were effective as between the parties and all claiming under them, except bona fide purchasers who recorded prior to 1949. *E.g., Gregerson v. Jensen,* 669 P.2d 396, 398 (Utah 1983). May and Lee Browning, whose purported rights were derived by intestate succession, were not bona fide purchasers. Accordingly, Mr. Browning, their successor by intestate succession, cannot take advantage of the delay in recording. The conveyances to P. J. Quealy and subsequent conveyances to Kemmerer terminated any resulting trust that may have affected the Coal Rights, and that trust need not be enforced in this lawsuit. 5 A. W. Scott, *The Law of Trusts* § 410, at p. 3226 (3d ed. 1967).

Even if the facts would otherwise support Mr. Browning's new argument, his claim to the Coal Rights and Fee Lands must still be supported by evidence that laches precludes enforcement of the trust. Implicit in Mr. Browning's new theory is an acknowledgement that no evidence of a repudiation exists. Mr. Browning, however, fails to note that he was unable to produce suf-

ficient evidence of any harm arising out of the delay in enforcement of the trust to support a finding of laches. Petition, App. at 39A-40A.

Mr. Browning's new theory finds no support in the law. The assertion that Ira Browning's death converted the purchase money resulting trust affecting the Coal Rights and the Fee Lands into a constructive trust is based upon a common law rule that applies exclusively to express, not resulting, trusts. Scott in his treatise on trusts explains that at common law when an express trustee died intestate, real property held by him in trust passed to his heir who "held it not as *express* trustees but as constructive trustees." II A. W. Scott, *The Law of Trusts* § 104, at p. 90 (4th ed. 1987) (emphasis added). No similar rule is discussed in Chapter 12 of the treatise, which deals with resulting trusts, because as Scott explains, the reason for the rule is unique to express trusts. The heir of an express trustee was not selected by the settlor. Accordingly, he should not be allowed to administer the trust. Thus, the rule developed that although the heir held title to the property, he did so as a constructive trustee pending appointment of a new express trustee by a court. *Id.* Obviously, neither the rule nor the reason for the rule applies to a purchase money resulting trustee, who does not administer a trust and has no duties other than to convey the property to the beneficiary. When such a trust comes before a court, no successor trustee is appointed, the court simply requires the heir to convey the property. *Cf. In re Estate of Hock*, 655 P.2d 1111 (Utah 1982) (trustee's estate held trust property as resulting, not constructive, trustee).

In addition, Utah law does not support Mr. Browning's assertion that, even in the absence of a repudiation, enforcement of all constructive trusts may be barred by the doctrine of laches. This rule only applies to constructive trusts that arise when a trustee holds property adversely to the beneficiary, such as where a trust is based upon fraud. In those circumstances, the beneficiary must commence his lawsuit promptly upon discovering the fraud. However, where the beneficiary of a constructive trust "has no reason to believe that the constructive trustee is holding the property adversely, the beneficiary will not be barred by laches even though he knows of the circumstances giving rise to the constructive trust." 5 A. W. Scott, *The Law of Trusts* § 481.1, at p. 3465 and n. 4 (3d ed. 1967 & Supp. 1987), *citing, Carnesecca v. Carnesecca,* 572 P.2d 708 (Utah 1977).

Mr. Browning appears to rely upon sections 409 and 481.1 of Scott on *The Law of Trusts* for the assertion that constructive trusts are presumed to be adversarial. Scott does not support that proposition. Instead, the treatise merely observes that constructive trusts are "ordinarily" based upon an adversarial relationship. *Id.* at 3464. The facts and circumstances giving rise to the trust must be examined in each instance to determine whether an adversarial relationship exists. A purchase money resulting trust, like some constructive trusts, is based upon a fiduciary relationship. 5 Scott, *supra,* § 409, 3225-26. Even if the death of a resulting trustee could convert the trust into a constructive trust, it does not convert a fiduciary relationship into an adversarial relationship. Only a repudiation accomplishes that re-

sult. For example, in *Carnesecca* the original trustee under a constructive trust died and his wife inherited legal title to the trust property. However, the death of the original trustee in *Carnesecca* was wholly irrelevant to the Utah court's consideration of whether the statute of limitations had run against the beneficiary. The court simply noted that neither the original trustee nor his wife had repudiated the trust and, consequently, the statute had not commenced to run. 572 P.2d at 711. Similarly, absent a showing of repudiation, Chevron and Consol are not barred by laches from enforcing any trust affecting the Coal Rights or the Fee Lands.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 26, 1988

APPENDIX "A"

Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation. Other related companies of Chevron U.S.A. Inc. are:

American Gilsonite Company
American Personnel Services Inc.
Atlas Supply Company
Bolivian Gulf Oil Company
California Company, The
Chevron Capital U.S.A. Inc.
Chevron Geothermal Company of California
Chevron Oil Finance Company
Chevron Petroleum Company Of The Netherlands
Chevron Travel Club, Inc.
  Chevron Travel Club Services Company
CLP Corporation
Federal Engineering Corporation
Felix Oil Company
Gulf Auto Club, Inc.
Gulf Oil Communications Company, Inc.
Gulf Oil Realty Company
  Gulf Reston Properties, Inc.
GOC Acquisition Corporation
Intermountain Geothermal Company
International Bitumen Emulsions Corporation
Kewanee Industries, Inc.
  Kewanee Overseas Oil Company
  Netherlands Kewanee, Inc.
Long Beach Oil Development Company
Lost Hills Water Company
Murvale Company
Pembroke Capital Company Inc.

Petroleum Facilities, Inc.
Standard Gasoline Company
Standard Oil Company
Standard Oil Company Of Texas, Inc.
Transocean Group, Inc.
Transinsco, Inc.
Warren Petroleum, Inc.
Western States Geothermal Company

Consolidation Coal Company is a wholly owned subsidiary of Conoco Inc., which in turn is a wholly owned subsidiary of E.I. du Pont de Nemours and Company.

The Pittsburgh & Midway Coal Mining Co. is a wholly owned subsidiary of Chevron Corporation.